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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	PP Docket No. 93-253
	)	
Implementation of Section 309(j)	)	
of the Communications Act -	)	
Competitive Bidding	)	

EMERGENCY MOTION FOR STAY OF
TELEPHONE ELECTRONICS CORPORATION

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January 6, 1995

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SUMMARY

Telephone Electronics Corporation ("TEC"), respectfully moves for a stay of the Commission's Fifth Report and Order and Fifth Memorandum Opinion and Order in PP Docket No. 93-253 pending the outcome of TEC's Petition for Review now pending before the United States Court of Appeals for the District of Columbia Circuit. TEC respectfully requests a stay of these auction rules to the extent necessary to permit TEC's small, rural telephone companies to file FCC Form 175s by February 28, 1995, and bid in the auction for the licenses in the entrepreneurs' blocks.

TEC's request meets all four requirements for the grant of such a limited stay. There is a strong likelihood that TEC will prevail on the merits of its appeal. The Fifth Report and Order prohibits TEC's small, rural telephone companies from bidding directly on licenses during the entrepreneurs' block auction, action by the Commission which is arbitrary and capricious and contrary to Section 309(j) of the Communications Act.

If the limited stay is not granted, the loss to TEC would be great, irreparable and certain to occur as TEC is denied any opportunity to bid on licenses that are sold during the auction. Adequate compensatory or other corrective relief will be unavailable at a later date if TEC is successful in its appeal. Once the auction for the entrepreneurs' block is completed and the licenses are issued, all available spectrum for broadband PCS will have been allocated.

The limited stay requested herein would not substantially harm any auction participant and would serve the public interest. A

grant of this stay would ensure that the auction will proceed as scheduled by the Commission and certainty would be created that the winning bidders will retain their licenses. There is no reason that a stay would harm those that are outbid by TEC's small, rural telephone companies as the Commission will have the authority to rescind any licenses granted to TEC's rural telephone companies and award those licenses to the second highest bidders in the unlikely event that the court affirms the Commission's decisions on appeal. The public interest is best served by granting a limited stay that maximizes the value of the entrepreneurs' block licenses for the public.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)))))	PP Docket No. 93-253

TO: The Commission

**EMERGENCY MOTION FOR STAY OF
TELEPHONE ELECTRONICS CORPORATION**

Telephone Electronics Corporation ("TEC"), by its attorneys and pursuant to §§ 1.43 and 1.44(e) of the Commission's rules, respectfully moves for a stay of the Commission's Fifth Report and Order and Fifth Memorandum Opinion and Order in the above-captioned proceeding.[1] Pending the outcome of TEC's Petition for Review now pending before the United States Court of Appeals for the District of Columbia Circuit,[2] TEC seeks a stay of the Commission's Fifth Report and Order and Fifth Memorandum Opinion and Order to the extent necessary to permit TEC's small, rural telephone companies to file FCC Form 175s by February 28, 1995, and bid in the auction for the licenses in the entrepreneurs' blocks.

I. STANDING

TEC is a privately-owned, small entrepreneurial company with its operations centered in rural areas. Its core business consists

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[1] Fifth Report and Order, 9 FCC Rcd. 5532 (1994), aff'd on recon., Fifth Memorandum Opinion and Order, FCC 94-285 (released November 23, 1994). A summary of the Fifth Memorandum Opinion and Order was published in the Federal Register on December 7, 1994 at 59 Fed. Reg. 63,210.

[2] Telephone Electronics Corporation v. FCC, No. 95-1015 (D.C. Cir. January 6, 1995).

of six small, rural telephone companies. The Commission's Fifth Report and Order prohibits these small, rural telephone companies from bidding directly on licenses during the entrepreneurs' blocks auction, a result contrary to Section 309(j) of the Communications Act.[3]

The Fifth Report and Order set aside specific spectrum blocks for broadband personal communications services ("PCS") that would be reserved for bidding by the three designated entities set forth in Section 309(j) of the Act: "small businesses, rural telephone companies and businesses owned by members of minority groups and women." This spectrum is termed the entrepreneurs' blocks. The Commission's rules define a "rural telephone company" as "a local exchange carrier having 100,000 or fewer access lines, including all affiliates."[4] TEC's local exchange carriers have less than 30,000 access lines, including all affiliates, and therefore are rural telephone companies.

The Fifth Report and Order adopted rules governing eligibility to bid in the auction for licenses of the entrepreneurs' blocks. The Commission limited bidding to entities that, together with their affiliates, have gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million. The Commission also limited small business bidding preferences to entities that, together with their affiliates, have

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3 Communications Act § 309(j), 47 U.S.C. § 309(j) (West Supp. 1994).

4 47 C.F.R. § 24.720(e).

average annual gross revenues for the preceding three years that are not more than $40 million.

TEC, when combined with all its affiliates, has a net worth of less than $30 million and total assets that are less than $300 million. While TEC's interexchange resale carriers had combined gross revenues of more than $125 million in each of the last two years, a substantial portion of this gross revenue was used to pay access charges to local exchange carriers.

In the Fifth Memorandum Opinion and Order, the Commission denied TEC's petition for reconsideration requesting revisions to its rules to permit TEC's small, rural telephone companies to participate in the upcoming auction. The Fifth Memorandum Opinion and Order also denied TEC's request for reconsideration of the Commission's affiliation rules, its license partitioning requirements, and its rules governing eligibility to receive bidding credits and to pay for winning bids in installments.

The Commission has announced a deadline of February 28, 1995, for filing the FCC Form 175 applications for determining eligibility to bid in the auction for the entrepreneurs' block licenses. FCC Public Notice released December 23, 1994. The Commission has scheduled the auction to commence the later of April 17, 1995 or 30 days after the close of the auction for the A and B block licenses. Once the auction for the entrepreneurs' blocks is completed and the licenses are issued, all available spectrum for broadband PCS will have been allocated.

In its appeal, pursuant to Section 402(a) of the Communications Act, TEC asked the Court to hold unlawful and vacate the Commission's Fifth Report and Order and Fifth Memorandum Opinion and Order to the extent that they deny TEC's small, rural telephone companies the opportunity to directly bid on licenses in the entrepreneurs' blocks. Although TEC's appeal has been docketed by the Court and can be expected to proceed in a timely manner, it will not be resolved prior to the February 28, 1995 deadline for filing the FCC Form 175 applications. Therefore, in the likely event that the Court reverses these Commission Orders, the judgment so obtained would be frustrated because, as set forth more fully below, the Commission may have completed the auction of all available broadband PCS spectrum.

TEC's small, rural telephone companies would be aggrieved and adversely affected by the auctioning of all broadband PCS spectrum prior to the resolution of its appeal. TEC therefore has standing as a party in interest to file the instant emergency motion for stay.[5]

II. ARGUMENT

A. TEC's Motion Meets the Criteria for Granting a Stay

The Commission evaluates motions for stay under well-established principles. To support a stay, TEC must demonstrate: (1) that it is likely to prevail on the merits; (2) that it will

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[5] See, e.g., Clarke v. Securities Industry Assoc., 479 U.S. 388 (1987); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); NBC v. FCC, 132 F.2d 545, 548-549 (D.C. Cir.), aff'd, 318 U.S. 239 (1943).

suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[6] The courts contemplate that the Commission will stay its own orders when it has "ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained."[7] TEC's request for a stay meets these requirements.

B. <u>TEC is Likely to Prevail on the Merits of its Appeal</u>

In denying TEC's petition for reconsideration, the Commission provided no reasoned analysis for applying its affiliation rules to small, rural telephone companies. The Commission failed to consider regulatory and corporate barriers that prevent a small, rural telephone company from cross-pooling with its affiliates. Instead, it indicated a desire to prevent a large telephone company from bidding in the auction for the entrepreneurs' blocks.[8] However, this is no explanation for applying the affiliation rules to a small telephone company when corporate and regulatory barriers prevent cross-pooling with its affiliates.

The D.C. Circuit has held that such affiliation is not relevant when corporate and regulatory barriers prevent cross-

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6 <u>Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.</u>, 559 F.2d 841, 843 (D.C. Cir. 1977).

7 <u>Id.</u> at 844-845.

8 <u>Fifth Memorandum Opinion and Order</u>, ¶ 45.

pooling with a small telephone company.[9] That case involved an FCC affiliation rule which required average schedule companies to convert to cost status if they were affiliated with cost companies. The Court found this affiliation rule to be unreasonable because the Commission failed to consider regulatory or corporate barriers that prevent cost companies from bearing the cost burden of affiliated average schedule companies.

The application of such affiliation rules to exclude a small telephone company from participating in the auction is unreasonable for the same reasons. The same corporate and regulatory barriers that preclude affiliates from paying for a small telephone company's cost studies, prevent those affiliates from paying a small telephone company's winning bids.

TEC's small, rural telephone companies face corporate barriers to cross-pooling with affiliates. TEC's small telephone companies are separately incorporated with separate management and facilities and operate in different states. The Commission has found such structural separation to be an effective means of preventing cost-shifting.[10] There has been no change in the Commission's policies challenging the effectiveness of such structural separation.[11]

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[9] National Ass'n of Regulatory Util. Comm'rs. v. FCC, 737 F.2d 1095, 1128 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227, 105 S. Ct. 1224 (1985).

[10] See, California v. FCC, 905 F.2d 1217, 1228 (9th Cir. 1990).

[11] An agency must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed. Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43-44, 103 S. Ct. 2856, 2866-67 (1983).

TEC's small, rural telephone companies also face regulatory barriers to cross-pooling. State and federal regulations expressly prohibit a small telephone company from shifting costs to its unregulated affiliates. For example, the Commission's affiliate transaction rules require a small telephone company to pay for assets received from its affiliates at the invoice price or fair market value.[12] Thus, the Commission acted arbitrarily and capriciously in applying its affiliation rules to TEC's small telephone companies in spite of the fact that corporate and regulatory barriers prevent cross-pooling with their affiliates, and TEC will ultimately prevail on the merits.

In light of these corporate and regulatory barriers, it is also unreasonable to apply these affiliation rules to disqualify a small telephone company from bidding preferences designed for small businesses. The Commission's rules define a small telephone company as any local exchange carrier with annual revenue from regulated communications operations of less than $40 million, and 50,000 or fewer access lines.[13] However, the Commission's affiliation rules disqualify several small telephone companies that satisfy this definition from the bidding preferences available to other small businesses, such as bidding credits and enhanced installment payments. The Commission has articulated no rational basis for treating a small telephone company like a large telephone

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[12] 47 C.F.R. § 32.27(b).

[13] 47 C.F.R. §§ 61.39(a), 69.602(a)(3).

company when corporate and regulatory barriers preclude it from cross-pooling with its affiliates.

The result of applying the affiliation rules to a small, rural telephone company is also contrary to Section 309(j) of the Communications Act. Section 309(j)(4)(D) mandates that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services" (emphasis added). The Commission must report to Congress the extent to which rural telephone companies "were able to participate successfully in the competitive bidding process."[14] The Commission's decisions, however, deny TEC's rural telephone companies of any opportunity to directly participate in the auctions for the entrepreneurs' blocks.

The Commission stated that "the partitioning system articulated in the Fifth Report and Order satisfies the directive of Congress to ensure that rural telephone companies have the opportunity to provide PCS services to all areas of the country, including rural areas."[15] This system, however, provides no such assurance. First, the Commission adopted a partitioning system that severely restricts where small, rural telephone companies can provide broadband PCS. Congress, however, did not restrict geographically where rural telephone companies could provide PCS. Rather, Congress required the Commission when prescribing area

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14 47 U.S.C. 309(j)(12)(D)(iv).

15 Fifth Memorandum Opinion and Order, ¶ 109.

designations, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[16]

Second, the Commission's partitioning system requires TEC's rural telephone companies to acquire PCS licenses from other applicants in lieu of bidding directly on licenses in the entrepreneurs' blocks. Excluding these rural telephone companies from the auction ignores the Congressional mandate that the Commission "disseminat[e] licenses" to rural telephone companies.[17] The Congressional purpose in mandating bidding preferences for rural telephone companies was to ensure that they would be able to successfully compete for licenses "in the competitive bidding process," not outside it.[18]

The partitioning rules do not provide a mechanism for "disseminating" licenses to rural telephone companies or for participation "in the competitive bidding process," as required by statute. The Commission's contention that licensees will "actively" sell partitioned licenses to rural telephone companies[19] is speculative at best. That a private party may be willing to sell a license for a price that is far more than was paid in the auction offers no real opportunity for a rural telephone company to

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16 47 U.S.C. § 309(j)(4)(C)(ii).

17 47 U.S.C. § 309(j)(3)(B).

18 47 U.S.C. § 309(j)(12)(D)(iv).

19 Fifth Memorandum Opinion and Order, ¶ 112.

acquire a PCS license. The sale of licenses between private parties, even were they to occur, would not comply with the statute as only the Commission has the authority to "disseminat[e]" licenses.

The Commission has also failed to articulate any rational basis for using gross revenue criteria for small business bidding preferences for the broadband PCS auctions instead of the net worth criteria used for the auctions of all other licenses.[20] In denying TEC's petition for reconsideration, the Commission merely restated its conclusory finding that a gross revenue test will produce the most equitable result.[21] The Commission rejected all other criteria, including net worth, as "administratively unworkable."[22] This is inadequate under the Administrative Procedure Act.[23] An agency must provide a reasoned analysis indicating that its policies and standards are being deliberately changed.[24]

TEC will ultimately prevail in showing that net worth criteria has been effectively applied during other auctions, and will provide a more accurate and equitable result than gross revenue criteria. Gross revenue is no indication of the amount of funds

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[20] In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding in PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, 2395-2396 (1994).

[21] Fifth Memorandum Opinion and Order, ¶ 23.

[22] Id.

[23] Puerto Rico Higher Education Assistance Corp. v. Riley, 10 F.3d 847, 852 (D.C. Cir. 1993).

[24] Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto Ins. Co., 463 U.S. at 43-44, 103 S. Ct. at 2866-67 (1983).

that an entity has available to be used for bidding in an auction. By contrast, net worth criteria identifies the financial resources that are unencumbered and, therefore, available for acquiring licenses in an auction. The Commission's eligibility rules would allow a business with an enormous net worth to participate in the auction for the entrepreneurs' blocks but deny that opportunity to businesses with little net worth and a greater need for access to capital. The discontinuity between the Commission's gross revenue criteria and the ability to attract capital is particularly acute where the entity in question is involved in a volume-intensive business with high operating costs and small profit margins, such as TEC's interexchange resale carriers. The Commission successfully applied net worth criteria to determine small business bidding preferences during the auctions of licenses for narrowband PCS and the interactive video data service.

C. TEC Will Be Irreparably Harmed if the Stay is Not Granted

TEC will be irreparably harmed if the Commission's Fifth Report and Order and Fifth Memorandum Opinion and Order are not stayed to the extent necessary to permit TEC's small, rural telephone companies to file FCC Form 175s by February 28, 1995, and bid in the auction. If such a stay is not granted, the injury to TEC is certain to occur as TEC is denied any opportunity to bid on licenses that are sold during the auction. A broadband PCS license would provide TEC with the exclusive use of valuable spectrum. The auction represents a great economic opportunity to participate in the provision of new technology and services. The loss to TEC if it is not granted the stay requested herein would be great.

The injury that TEC will ultimately suffer if this stay is not granted will be irreparable. Adequate compensatory or other corrective relief will be unavailable at a later date if TEC is successful in its appeal. By the time the Court renders a decision on TEC's appeal, it will be impracticable for the Commission to undo the rights and obligations of all the auction winners and rescind all the licenses that have been granted. An attempt to undertake such an effort would frustrate an important Congressional objective: "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays"[25].

D. Others Will Not Suffer Substantial Harm by Grant of the Stay

No other parties will suffer harm from a grant of the limited stay requested herein. To the contrary, by granting this stay, the auction will proceed as scheduled by the Commission and certainty will be created that the winning bidders will retain their licenses. The limited stay requested herein will permit TEC's small, rural telephone companies to file FCC Form 175s by February 28, 1995, and bid in the auction only until the U.S. Court of Appeals renders a decision concerning TEC's appeal.

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25 47 U.S.C. § 309(j)(3)(A).

There is no reason that a stay should delay either the auction or the provision of broadband PCS to the public. Moreover, there is no reason why such a stay would harm those that are outbid by TEC's small, rural telephone companies. In the unlikely event that the Court affirms the Commission's decisions on appeal, the Commission will have the authority to rescind any licenses granted to TEC's rural telephone companies and award those licenses to the second highest bidders. "An order maintaining the status quo is appropriate where a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant."[26]

E. A Stay Will Serve the Public Interest

Clearly, the public interest is best served by granting this limited stay pending the Court's action on TEC's appeal. If the auction proceeds without this stay, the winning bids will be contingent upon the outcome of TEC's appeal. The plans and commitments of the winning bidders, both for revenue and expenditure, will be rendered uncertain; their future would be undetermined. The winning bids and the licenses sold at the auction would take on an unwarranted conditional character. The licenses would become less valuable. "Obviously, operation upon such a basis causes losses in comparison to operation absent such

[26] Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, Inc., 559 F.2d at 844.

pending contingencies; and that such losses cannot be recouped is also obvious."[27]

III. CONCLUSION

For the foregoing reasons discussed herein, Telephone Electronics Corporation respectfully requests that the Commission stay its Fifth Report and Order and Fifth Memorandum Opinion and Order pending the outcome of TEC's appeal to the U.S. Court of Appeals. The stay requested herein is no broader than necessary to allow TEC's small, rural telephone companies to file FCC Form 175s by February 28, 1995, and bid in the auction for the licenses in the entrepreneurs' blocks scheduled for April 17, 1995. In view of the strong likelihood that TEC will prevail on the merits of its appeal and the irreparable harm to TEC that will occur if this limited stay is not granted, such a stay is appropriate. This limited stay would not substantially harm any auction participant

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[27] Greylock Broadcasting Co. v. United States, 231 F.2d 748, 749 (D.C. Cir.), cert. denied, 352 U.S. 935 (1956).

and would serve the public interest. Accordingly, the Commission should grant TEC's emergency motion for a stay.

Respectfully submitted,

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Dated: January 6, 1995

JUT00899

CERTFICIATE OF SERVICE

I hereby certify that on January 6, 1995, a copy of the foregoing Emergency Motion for Stay was served by first-class mail, postage prepaid, upon those parties on the attached Service List.

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